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 12 UNUM LIFE INSURANCE COMPANY OF AMERICA

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 14  
 15 **UNITED STATES DISTRICT COURT**  
 16 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

17  
 18  
 19 ***E-FILING***  
 20 SHERI GARAY, ) CASE NO. **3:08-cv-01059 SBA**  
 21 Plaintiff, ) JOINT STATUS REPORT/CASE  
 22 vs. ) MANAGEMENT CONFERENCE  
 23 UNUM LIFE INSURANCE COMPANY OF ) STATEMENT  
 24 AMERICA, and DOES 1-10, ) Date May 28, 2008  
 25 Defendants. ) Time: 2:45 p.m.  
 26 ) Ctrm: (Telephonic)  
 27 ) The Honorable Saundra Brown Armstrong

28 Pursuant to the Court's Order of February 21, 2008 which requires the parties to file a  
 Joint Case Management Conference Statement by May 20, 2008, the parties hereby submit the  
 following:

1    **1.    Jurisdiction and Service**

2        Defendant, in its Notice of Removal, asserted ERISA preemption and diversity of  
 3 citizenship as two grounds for federal jurisdiction. On March 21, 2008, Plaintiff filed a notice of  
 4 non-objection to the jurisdiction of the Federal Courts pursuant to the diversity of citizenship of  
 5 the parties and notified the Court and Defendant that Plaintiff does not agree to the Court having  
 6 subject matter jurisdiction as Plaintiff asserts that this case is not preempted by ERISA.

7        All parties have been served.

8    **2.    Facts**

9        Plaintiff is currently receiving long-term disability benefits from Unum, however Plaintiff  
 10 alleges that she was wrongfully denied disability benefits for a closed period, from June 10, 2002  
 11 through March 2004, and further disputes the manner in which the amount of her disability  
 12 benefits were and are currently calculated.

13       Plaintiff asserts causes of action for breach of contract, declaratory relief, and breach of  
 14 the implied covenant of good faith and fair dealing against the Defendant insurance company and  
 15 maintains that ERISA does not preempt her state law causes of action against the Defendant.  
 16 This litigation surrounds the long-term disability benefits insurance policy issued to Plaintiff  
 17 Sheri Garay in her capacity as a sole proprietor of two Site for Sore Eyes stores in California.

18       Defendant Unum Life Insurance Company of America, by its Answer, denies each of  
 19 Plaintiffs' allegations and asserts ERISA preemption to Plaintiff's state law claims.

20    **3.    Legal Issues**

21       Unum contends that ERISA governs this action as the plan covered one or more  
 22 employees in addition to than the business owner. *Raymond B. Yates, M.D., P.C. Profit Sharing*  
*Plan v. Hendon*, 541 U.S. 1, 6 (2004).

24       Unum further contends that plaintiff's state law causes of action are preempted by  
 25 ERISA. *Cleghorn v. Blue Shield of California*, 408 F.3d 1222, 1225 (9th Cir. 2005) (quoting 29  
 26 U.S.C. §§ 1144(a), (b)(2)(A)).

27        ///

28        ///

1        Unum further contends that ERISA does not provide for a trial by jury. *Ingram v. Martin*  
 2 *Marietta Long Term Disability Income Plan for Salaried Employees of Transferred GE*  
 3 *Operations*, 244 F.3d 1109, 1114 (9th Cir. 2001).

4        Unum further contends that plaintiff's claims are barred by the applicable statute of  
 5 limitations, including but not limited to, California Code of Civil Procedure, Sections 340(3),  
 6 340(1), 339 subd. 1, 338(b)(c) & (d) and 343

7        Plaintiff contends that a separate, independent plan issued to her as opposed to her  
 8 employees. *See Laventure v. Prudential Co. of America*, 237 F.3d 1042 (9th Cir. 2001); *Slamen*  
 9 *v. Paul Revere Life Ins. Co.*, 166 F.3d 1102 (11th Cir. 1999); *Kemp v. Int'l Bus. Mach. Corp.*,  
 10 109 F.3d 708 (11th Cir. 1997). Plaintiff alternatively contends ERISA does not preempt the plan  
 11 due to ERISA's safe harbor provisions. 29 C.F.R. sec. 2510.3-1(j). Plaintiff further contends that  
 12 Defendant waived ERISA preemption by omitting any reference to ERISA in the plan language  
 13 Plaintiff further contends that ERISA will not preempt the contemplated amendment of her  
 14 Complaint to include a cause of action for fraud wherein Unum issued fraudulent tax documents  
 15 to her. *See Dishman v. Unum Life Ins. Co. of America*, 269 F.3d 974 (9<sup>th</sup> Cir. 2001).

16 **4. Motions**

17        Unum will file a motion for partial summary judgment addressing the issue of whether  
 18 ERISA governs this action. If that motion is successful, then the case may be decided on cross-  
 19 motions for summary judgment.

20 **5. Amendment of Pleadings**

21        Plaintiff may seek to amend her Complaint to allege that Defendant engaged in fraud and  
 22 further breached the implied covenant of good faith and fair dealing by issuing her a 1099 for the  
 23 year of 2007 which indicated Plaintiff was paid over \$200,000 by Defendant in 2007 when  
 24 Defendant did not pay Plaintiff anywhere near that amount of money in 2007.

25        Unum will address this issue if Plaintiff moves to amend her complaint.

26 **6. Evidence Preservation**

27        The parties agree, during pendency of the litigation, to preserve all documents relevant to  
 28 the subject matter of litigation, including, electronic databases, internal and external e-mail

1 systems, and hard copy documents. The parties affirm that appropriate steps have been taken to  
 2 help ensure the preservation of potentially discoverable materials.

3 **7. Disclosures**

4 Initial disclosures pursuant to Rule 26(f) will be made by both parties by May 20, 2008 as  
 5 required by the Court's Case Management Scheduling Order.

6 **8. Discovery**

7 ***1. Subjects on which discovery may be needed:***

8 Plaintiff seeks discovery of Defendants' claims handling manuals and any other policies,  
 9 memorandums or other internal communications regarding determining partial versus total  
 10 disability, calculating the loss of income of disabled sole proprietors, calculating the basic  
 11 monthly earnings of sole proprietors, and misrepresenting policy language or the effect of State  
 12 law to claimants.

13 If the case is preempted by ERISA, as posited by Defendant, then discovery may or may  
 14 not be appropriate depending on whether an abuse of discretion or *de novo* standard of review  
 15 applies to the case.

16 ***2. Changes in the limitation on discovery imposed under federal or local rules:***

17 Defendant will seek to limit Plaintiff's right to discovery by asserting ERISA preemption  
 18 and an abuse of discretion standard which limits discovery to the administrative record.

19 **9. Class Action**

20 This case is not a class action.

21 **10. Related Cases**

22 There are no related cases.

23 **11. Relief**

24 Plaintiff seeks compensatory relief, including pre-judgment interest, 1) for monthly  
 25 disability benefits from June 10, 2002 through March 2004; 2) for compensation in the amount of  
 26 the difference between the lower monthly benefit amount determined by Defendant and the  
 27 higher monthly benefit amount actually owed to Plaintiff from March 2002 through the present  
 28 and continuing in the future; and 3) for taxes wrongfully withheld from Plaintiff's benefits.

1 Plaintiff further seeks incidental damages, general damages, attorneys fees and costs of suit, and  
2 punitive damages.

3 **12. Settlement and ADR**

4 Plaintiff and Defendants submitted a Notice of Need for ADR Phone Conference on May  
5 8, 2008 and request a settlement conference before Magistrate Judge Spero.

6 **13. Consent To Magistrate Judge For All Purposes**

7 The parties do not consent to a Magistrate Judge for all purposes.

8 **14. Other References**

9 This case is not suitable for reference to binding arbitration, a special master, or the  
10 Judicial Panel on Multidistrict Litigation.

11 **15. Narrowing of Issues**

12 Unum will file a motion for partial summary judgment. This motion may narrow the  
13 issues substantially. Plaintiff disagrees that this matter is governed by ERISA.

14 **16. Expedited Schedule**

15 If this case is found to be governed by ERISA, then this case will likely be substantially  
16 streamlined. Plaintiff disagrees that this matter is governed by ERISA.

17 **17. Scheduling**

18 *a. Expert witness disclosures:*

19 March, 2009

20 *b. Discovery Cut-off:*

21 February, 2009

22 *c. Hearing of dispositive motions*

23 March, 2009

24 *d. Pretrial Conference*

25 June, 2009

26 *e. Trial*

27 August, 2009

28 / / /

18. **Trial**

2 Plaintiff has demanded a trial by jury. A jury trial of this case will likely last 7 court  
 3 days.

4 If the Court determines that this matter is governed by ERISA, this case will not be tried  
 5 to a jury and the trial likely consist of the trial briefs supplemented with the argument of counsel.  
 6 The ERISA trial will last less than one half day.

19. **Disclosure of Non-party Interested Entities or Persons**

8 Plaintiff filed a certificate on May 16, 2008 indicating that there are no other interested  
 9 parties. Plaintiff proceeds as an individual.

10 Defendant has filed a Certificate and an Amended Certificate stating the following:

11 The undersigned certifies that the following listed persons,  
 12 associations of persons, firms, partnerships, corporations (including  
 13 parent corporations) or other entities (i) have a financial interest in the  
 14 subject matter in controversy or in a party to the proceeding, or (ii)  
 15 have a non-financial interest in that subject matter or in a party that  
 16 could be substantially affected by the outcome of this proceeding:

17

1. Sheri Garay, plaintiff.
2. Unum Life Insurance Company of America.
3. Unum Group, the parent corporation of Unum Life Insurance  
 Company of America.

20. **Such Other Matter as May Facilitate the Just,  
 Speedy and Inexpensive Disposition of this Matter**

21 The parties have nothing further to raise in this regard.

22 LAW OFFICES OF JOHN F. MARTIN  
 A Professional Corporation

23 DATED: May 20, 2008

24 By: /s/ CHRISTINE HOPKINS  
 CHRISTINE HOPKINS, ESQ.  
 Counsel for Plaintiff SHERI GARAY

25 RIMAC & MARTIN, P.C.

26 DATED: May 20, 2008

27 By: /s/ ANNA M. MARTIN  
 ANNA M. MARTIN, ESQ.  
 Counsel for Defendant UNUM LIFE  
 INSURANCE COMPANY OF AMERICA